

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

GUSTAVO HERNANDEZ,

Plaintiff,

v.

KERRY EARLEY,

Defendant.

Case No. 3:22-CV-00304-ART-CLB

**REPORT AND RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE<sup>1</sup>**

Before the Court is Plaintiff Gustavo Hernandez's ("Hernandez"), application to proceed *in forma pauperis* (ECF No. 1), and civil rights complaint, (ECF No. 1-1). For the reasons stated below, the Court recommends that Hernandez's *in forma pauperis* application, (ECF No. 1), be denied as moot, and his complaint (ECF No. 1-1), be dismissed without prejudice and without leave to amend.

**I. IN FORMA PAUPERIS APPLICATION**

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to the LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the

---

<sup>1</sup> This Report and Recommendation is made to the Honorable Anne R. Traum, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 applicant's income, assets, expenses, and liabilities."

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with  
3 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th  
4 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely  
5 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,  
6 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Hernandez can pay the filing  
8 fee. (See ECF No. 1 at 4.) However, because the Court recommends that this case be  
9 dismissed without prejudice and without leave to amend, the Court also recommends that  
10 Hernandez not be assessed the filing fee and the motion be denied as moot.

## 11 **II. SCREENING STANDARD**

12 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A  
13 provides, in relevant part, that "the court shall dismiss the case at any time if the court  
14 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a  
15 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant  
16 who is immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when  
17 "it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325  
18 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims  
19 against defendants who are immune from suit or claims of infringement of a legal interest  
20 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
21 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th  
22 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same  
23 standard applied in the context of a motion to dismiss under Federal Rule of Civil  
24 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which  
25 requires dismissal where the complaint fails to "state a claim for relief that is plausible on  
26 its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

27 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*  
28 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must

1 accept as true all well-pled factual allegations, set aside legal conclusions, and verify  
 2 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.  
 3 662, 679 (2009). The complaint need not contain detailed factual allegations, but must  
 4 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a  
 5 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is  
 6 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies  
 7 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).  
 8 Still, a liberal construction may not be used to supply an essential element of the claim  
 9 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is  
 10 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice  
 11 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*  
 12 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

### 13 **III. SCREENING OF COMPLAINT**

14 In his complaint, Hernandez sues Defendant District Court Judge Kerry Earley  
 15 (“Earley”) under 42 U.S.C. § 1983. (See ECF No. 1-1.) Hernandez’s complaint asserts  
 16 three counts, which all relate to his underlying criminal case and conviction. (*Id.* at 2-5.)  
 17 Hernandez requests monetary damages and “a referral of decision to the Nevada  
 18 Supreme Court for sentence vacating.” (*Id.* at 6.)

19 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority  
 20 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d  
 21 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.  
 22 2000)). The statute “provides a federal cause of action against any person who, acting  
 23 under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526  
 24 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive  
 25 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,  
 26 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation  
 27 of a federally-protected right by (2) a person or official who acts under the color of state  
 28 law. *Anderson*, 451 F.3d at 1067.

1           However, § 1983 is not a backdoor through which a federal court may overturn a  
2 state court conviction or award relief related to the fact or duration of a sentence. Section  
3 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts  
4 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they  
5 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.  
6 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take  
7 care to prevent prisoners from relying on § 1983 to subvert the differing procedural  
8 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at  
9 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner  
10 challenges the legality or duration of his custody, raises a constitutional challenge which  
11 could entitle him to an earlier release, or seeks damages for purported deficiencies in his  
12 state court criminal case, which effected a conviction or lengthier sentence, his sole  
13 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);  
14 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*  
15 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where  
16 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction  
17 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate  
18 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

19           It appears that Hernandez is challenging the constitutionality of his state court  
20 criminal conviction. Consequently, he must demonstrate that his conviction has been  
21 overturned to proceed in an action under § 1983. As he has not done so, his sole relief is  
22 a *habeas corpus* action. The Court, therefore, recommends that the complaint be  
23 dismissed without prejudice and without leave to amend.

#### 24   **IV. CONCLUSION**

25           For good cause appearing and for the reasons stated above, the Court  
26 recommends that Hernandez’s application to proceed *in forma pauperis*, (ECF No. 1), be  
27 denied as moot, and his complaint, (ECF No. 1-1), be dismissed without prejudice and  
28 without leave to amend.

1 The parties are advised:

2 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
3 Practice, the parties may file specific written objections to this Report and  
4 Recommendation within fourteen days of receipt. These objections should be entitled  
5 "Objections to Magistrate Judge's Report and Recommendation" and should be  
6 accompanied by points and authorities for consideration by the District Court.

7 2. This Report and Recommendation is not an appealable order and any  
8 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the  
9 District Court's judgment.

10 **V. RECOMMENDATION**

11 **IT IS THEREFORE RECOMMENDED** that Hernandez's application to proceed *in*  
12 *forma pauperis*, (ECF No. 1), be **DENIED AS MOOT**;

13 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-  
14 1); and,

15 **IT IS FURTHER RECOMMENDED** that Hernandez's complaint, (ECF No. 1-1), be  
16 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

17 **DATED:** July 25, 2022.

18   
19 **UNITED STATES MAGISTRATE JUDGE**